Aff'd — Judge Davis —
Justice Clifford
Dec'd

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~395.~~ 160

THE AMERICAN STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

vs.

PHILIP B. CHACE, ADMINISTRATOR OF GEORGE COOK, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

FILED NOVMBER 22, 1871.

18 How [illegible] 76
Dec'd 1854

SUPREME COURT OF THE UNITED STATES.

No. 395.

THE AMERICAN STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

vs.

PHILIP B. CHACE, ADMINISTRATOR OF GEORGE COOK, DECEASED

IN ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

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1 THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Newport, sc:

To the sheriffs of our several counties, or to their deputies, greeting:

We command you to summon the American Steamboat Company, a corporation created by law, & having its place of business in Providence, (if they may be found in your precinct) to answer the complaint of Philip B. Chase, of Portsmout', administrator of the estate which was of the late George Cook, who sues for the benefit of Sarah Cook, the widow, & George Cook, William Cooke, Sarah Cook, & Ruth Walker, the children of the late George Cook, & all of Portsmouth, in said county of Newport, at the next court of common pleas to be holden at Newport, within and for our said county of Newport, on the third Monday of November next ensuing the date hereof, in an action of the case. For that, on the 29th day of June last past, the defendants were common carriers of passengers, by steamboats, between Newport & Providence, over the waters of Narragansett Bay, the same being one of the public highways, & while the said George Cook was crossing the said bay, in the exercise of due care the
by their steamboat called the Whatcheer, under the command of one Loyd L. Sutton & other officers & servants of the defendants, who so negligently & carelessly managed & directed the said steamboat as to run the upon and over the said George Cook, the intestate, whereby & because of the premises he was killed, & an action has accrued to the pl'ff; and also for that the defendants, by the negligence & carelessness of their servants & agents in managing & conducting their steamboat called the Whatcheer, killed the said George Cook, the pl'ffs intestate, whereby an action has accrued to the pl'ff'*i* for the benefit of the said widow & children of the said intestate, to have & recover from the defendant the loss & damage they have sustained in consequence of the said killing, as by declaration to be filed in court will be fully set forth, to the damage of the plaintiff fifty thousand dollars.

Hereof fail not, and make true return of this writ with your doings thereon.

Witness, George A. Brayton, esq., at Newport, this twelfth day of October, in the year 1869.

[L. S.] (Sig'ed,) THO'S W. WOOD, *Clerk.*

(Indorsements.)

PROVIDENCE, *sc:*

PROVIDENCE, *October* 15, 1869.

I have made service of this writ on the American Steamboat Company by leaving a true and attested of this writ with Alfred R. Hall, he being the clerk of the within-named American Steamboat Co., at *at* office in the city of Providence.

P'H FAIRBROTHER,
Dep't Sheriff.

Fees: Service, 50; copy, 40; travel, 3.—$3.90.

Writ. Philip B. Chase, adm'r for benefit of widow & children of George Cook, dec'd, v. The American Steamboat Company.

REC. 395—1

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Court of common pleas, November term, A. D. 1869.

PHILIP B. CHASE, ADM'R,
v.
THE AMERICAN STEAMBOAT COMPANY.

Philip B. Chase, of Portsmouth, in the county of Newport, administrator of the estate which was of the late George Cook, late of Portsmouth, aforesaid, sueing for the benefit of Sarah Cook, the widow of the said George, George Cook, William Cook, Sarah Cook, & Ruth Walker, children of the said George Cook, complains of the American Steamboat Company, a corporation created by law, & having its place of business located in the city & county of Providence, duly held to answer to the plaintiff in an action of trespass in the case: For that the said defendant, at said Providence, to wit, at said Newport, on the 29th day of June, A. D. 1869, were common carriers of passengers between said city of Newport and the city of Providence, over the waters of Narragansett Bay, the same being one of the public highways within the said State of Rhode Island, the said defendants then & there having in their said service and employment as carriers of freight
3 and passengers the steamboat Whatcheer, whereof one Loyd S. Sutton was then and there master, as the servant and agent of the said defendants, and the plaintiff avers that, by the reason of the unfitness, carelessness, and negligence of the said Sutton, as aforesaid, and of the officers and crew of the said steamboat Whatcheer, all agents and servants of the said defendants, and of the unfitness of the said steamboat to be used by said defendants in navigating the said bay & upon the said public highway, the said steamboat was directed managed so negligently, carelessly, and unskillfully that she wrongfully was made to run upon, and to come in contact with, and break and destroy a sail-boat, in which the said George Cook, the plaintiff's intestate, was then, in the exercise of due care, being carried upon and over the said waters of said bay & public highway aforesaid, whereby, and by means of the unfitness, carelessness, & negligence of the said servants and agents of the said defendant corporation, the said George Cook received from the said steamboat of the defendant, a mortal wound upon his back and body, whereof he instantly died; and the plaintiff avers that the said George Cook, his intestate, at the time when he was killed as aforesaid, was a man in the full vigour of life, in good health, and
4 was a man of good character, a kind & provident husband & an affectionate father, and was in the habit of earning & receiving a large amount of money annually from the proceeds of his labours & employment; all of which, the benefit and comfort of his society, have been lost to his widow & children, for whose benefit this action has been brought, whereby an action has accrued to the plaintiff to have and recover from the defendant corporation the damages which have been sustained by the said widow & children in consequence of the killing of the said George Cook, as aforesaid.

And also for that the said defendant, upon the waters of the Narragansett Bay, and on the 29th day of June, A. D. 1869, by their servants and agents, did so carelessly, recklessly, & wrongfully manage, direct, and conduct their steamboat, called the Whatcheer, that *that* the said steamboat came in contact with, was run upon, against, and over a sailing-boat, then being controlled and managed with due care, upon which the said pl'fff's intestate was, and the said pl'fff's intestate, by the said wrongful, negligent, and careless acts of the said defendant, & of their

servants and agents, had inflicted upon him, by the said steam-
5 boat of the said defendant, a mortal wound in and upon the back & body of him, the said intestate, whereof he then instantly died, whereby the said widow & children have been deprived of the comfort & solace of the society of the pl'fft's intestate, and of the benefit of his counsel & labor, and by force & virtue of the premises an action has accrued to the pl'fft to have & recover for the benefit of the said widow & children, for the damages which they have sustained in the premises, which the pl'fft avers to be fifty thousand dollars, as is laid in his writ, dated October 12th, 1869; wherefore he sues by att'y.

W. P. SHEFFIELD.

(Endorsed:) 271. Deacon Philip B. Chase, adm'r, v. The American Steamboat Co. Filed Nov. 3, 1869. Tho's W. Wood, cl'k. Recorded b'k 23, pages 99, 100, by T. W. W. W'm P. Sheffield, pl'fft's att'y.

6 NEWPORT, *ss:*

Court of common pleas. November term, A. D. 1869.

PHILIP B. CHASE, ADM'R, }
v. }
AMERICAN STEAMBOAT CO. }

And the said def'ts come, &c., when, &c., and say that they are not guilty in manner and form as the pl'fft has, in his declaration thereof, complained against them.

By their att'ys.

THURSTON, RIPLEY & CO.

Pl'fft doth the like per att'y.

W. P. SHEFFIELD.

(Endorsed:) Chase, adm'r, v. Am. Steamboat Co. Def'ts pleas. T. R. & Co., def'ts att'ys.

7 CHACE, ADM'R, }
v. } 291. November term, A. D. 1869. 99.
STEAMBOAT CO. }

Be it remembered that, at the November term, A. D. 1869, of this court, Philip B. Chace, of Portsmouth, in our county of Newport, administrator of the estate which was of the late George Cook, late of Portsmouth, aforesaid, sueing for the benefit of Sarah Cook, widow of the said George, George Cook, William Cook, Sarah Cook, & Ruth Walker, children of the said George Cook, complained of The American Steamboat Company, a corporation created by law, & having its place of business located in the city & county of Providence, duly held in an action of trespass on the case:

For that the said defendants, at said Providence, to wit, at said Newport, on the 29th day of June, A. D. 1869, were common carriers of passengers between said city of Newport and the city of Providence, over the waters of Narragansett Bay, the same being one of the public highways within the State of Rhode Island, the said def'ts then & there having, in their said service and employment, as carriers of freight and passengers, the steamboat Whatcheer, whereof one Loyd S. Sutton

was then and there master, as the servant and agent of the said def'ts; and the pl'ff*t* avers that, by the reason of the unfitness, carelessness, and negligence of the said Sutton, as aforesaid, and of the
8 officers and crew of the said steamboat Whatcheer, all agents and servants of the said def'ts, and of the unfitness of the said steamboat to be used by said def'ts in navigating the said bay, & upon the said public highway, the said steamboat was directed, managed so negligently, carelessly, and unskillfully, that it wrongfully was made to run upon, and to come in contact with, and break and destroy a sail-boat in which the said George Cook, the pl'ff*t*'s intes-

CHACE v. STEAMBOAT COMpany. } 100.

tate was then, in the exercise of due care, being carried over and upon the waters of the said bay & public highway aforesaid, whereby, and by means of the unfitness, carelessness, & negligence of the said servants and agents of the said def'ts corporation, the said George Cook received from the said steamboat of the def'ts a mortal wound upon his back and body, whereof he instantly died. And the pl'ff*ts* avers that the said George Cook, his intestate, at the time when he was killed, as aforesaid, was a man in the full vigor of life, in good health, and was a man of good character, a kind and provident husband, & an affectionate father, and was in the habit of earning & receiving a large amount of money annually from the proceeds of his labor & employment, all of which,
9 & the benefit and comfort of his society have been lost to his widow & children, for whose benefit this action has been brought, whereby an action accrued to the pl'ff*t* to have and recover from the def't corporation the damages which have been sustained by the said widow & children in consequence of the killing of the said George Cook, as aforesaid, which the pl'ff*t* avers to be $50,000, as is laid in his writ dated October 12th, 1869. Wherefore he sues by attorney.

W'M P. SHEFFIELD.

Def't pleads "general issue."

And, on the 3rd day, def't submitted to judgment for $50,000. Wherefore it was considered by the court that the pl'ff*t* have of the def't fifty thousand dollars damages, and his costs of suit taxed at nine $\frac{40}{100}$ dollars.

Def't filed appeal bond.

10 Know all men by these presents that I, Benj'n F. Thurston, of the city and county of Providence, in the State of Rhode Island, am held and firmly bound unto Philip B. Chac', administrator on the estate of George Cook, who brings the suit for the benefit of the widow and children of the said George Cook, intestate, in the sum of one hundred dollars to be paid said administrator, his heirs, executors, administrators, successors, or assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the seventeenth day of November, in the year 1869.

The condition of the above obligation is such, that whereas at a court of common pleas, begun and holden at Newport, within and for the county of Newport, on the third Monday of November, A. D. 1869, the said Philip B. Chace, administrator on the estate of George Cook, recovered a judgment of said court against The American Steamboat Company, a corporation located in the city of Providence, from which judgment the said American Steamboat Company has appealed to the next supreme court to be holden at said Newport on third Monday of March

next: Now, if the said American Steamboat Company shall prosecute said appeal with effect, or in default thereof pay costs, then the above obligation shall be void; otherwise to remain in full force and virtue.

BENJ'N F. THURSTON. [SEAL.]

Signed, sealed, and delivered in presence of—
ORVILLE PECKHAM.

(Endorsed:) Appeal bond. Chace, adm'r, v. Am. St'boat Co. Filed Nov. 19, 1869. (Signed) Tho's W. Wood, cl'k.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
County of Newport, ss:

OFFICE CLERK OF COURT OF COMMON PLEAS.

I, Thomas W. Wood, clerk of the court aforesaid, for and within the State and county aforesaid, do hereby certify that the foregoing nineteen pages contain a true and correct copy of the papers and judgment in the case Philip B. Chace, administrator, vs. The American Steamboat Company, as compared by me this day with the original in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this nineteenth day of November, A. D. 1869.

[SEAL.] THO'S W. WOOD, *Clerk.*

11 NEWPORT, *ss:*

Supreme court. March term, 1870.

PHILLIP B. CHACE, ADM.,
vs.
AMERICAN STEAMBOAT COMPANY.

The defendants in the above entitled cause appeal from a judgment rendered against them at the November term of the court of common pleas for said county of Newport, and for reasons of their appeal, say—

That said judgment is erroneous in law and in fact, and ought to be reversed.

AMERICAN STEAMBOAT CO.,
By their attorneys, THURSTON, RIPLEY & CO.

(Endorsed:) 454. Reasons of appeal. Philip B. Chase v. American Steamboat Co. Thurston Ripley & Co., att'ys for Am. Steamboat Co. Filed Nov. 19, 1869. Tho's W. Wood, cl'k. Recorded b'k 22, pages 4 to 23, inclusive, by T. W. W.

12 NEWPORT, *ss:*

Supreme court. March term, 1870.

PHILIP B. CHACE, ADM.,
v.
THE AMERICAN STEAMBOAT COMPANY.

The defendants move to dismiss said action for want of jurisdiction.

By their attorneys, A. PAYNE.
B. F. THURSTON, &
J. A. GARDNER.

(Endorsed:) Motion to dismiss. Philip B. Chace, adm., v. American Steamboat Co. Filed Apr' 11, 1870. Tho's W. Wood, cl'k.

13 NEWPORT, *ss:*

Sup. court. March term, 1870.

IN THE CASE PHILIP B. CHASE, ADM.,
v.
THE AMERICAN STEAMBOAT CO.

This case came on for trial at the present term of the court, and before the same was submitted to the jury the defendant filed a motion to dismiss the said cause because the said court had no jurisdiction to try the same, which motion was allowed & sustained by the court against the protest of the pl'ff*t*, and the said cause was ordered by the presiding justice of said court to be dismissed; which order & ruling of the said justice the pl'ff*t* alleges to have been erroneous as a matter of law, wherefore he prays that the said order of the said justice may be set
14 aside, and that a *a* trial of the said cause be granted him. & as in duty bound he will ever pray.

Per at'y W. P. SHEFFIELD.

Allowed.

E. R. POTTER, *J. S. C.*

Agreed to be heard in Providence County.
W. P. SHEFFIELD, *For Pl'ff't.*
BENJ' F. THURSTON, *For Def'd's.*

(Endorsed:) Motion for new trial. Philip B. Chase, adm., v. American Steamboat Co. Filed April 19, 1870. Tho's W. Wood, cl'k.

15 NEWPORT, *Nov.* 11*th*, 1870.

PHILLIP B. CHASE, ADMINISTRATOR OF the estate of George B. Cook,
vs.
AMERICAN STEAMBOAT CO.

Jury find for plaintiff twelve thousand dollars damages.
W. J. MUNRO, *Foreman.*

NEWPORT, *sc:*

Sup. court. Sep' term, 1870.

IN THE CASE PHILIP B. CHASE, ADM.
v.
THE AMERICAN STEAMBOAT CO.

The jury find the defendant corporation guilty in manner & form as the pl'ff*t* has against them alleged, and assess damages for the pl'ff*t* in the sum of twelve thousand dollars.

W. J. MUNRO, *Foreman.*

16 NEWPORT, *sc:*

Supreme Court. September term, A. D. 1870.

PHILIP B. CHACE, ADM'R
vs.
AMERICAN STEAMBOAT CO.

Defendant's motion for new trial.

And now, after verdict for the plaintiff for twelve thousand dollars, rendered by the jury upon the trial of the above-entitled cause and within the time allowed by law & by the order of the court, the defendants move for a new trial; and, for the grounds of their motion, in addition to the ruling adverse to the claim of the defendants that this court has not jurisdiction of this cause under & by virtue of sect. 2, art. III of the Constitution of the United States & §9 of the judiciary act of Congress, approved Sept. 24, A. D. 1789, say:

First. Because the defendants requested the court to instruct the jury as follows, viz: That the plaintiff's cause of action, if any he has, is given by the 16th or the 21st section of chapter 176 of the Revised Statutes, & that the plaintiff has no cause of action under the 16th sec-
17 tion unless the jury find that the plaintiff's intestate was a passenger in a conveyance used by the defendants as common carriers, or in the care of the defendants as proprietors of or common carriers by means of railroad or steamboat, or unless the jury find that he was crossing upon a public highway with reasonable care, and that the term "public highway" should be construed to mean a public highway on land, & not to embrace the waters of Narragansett Bay or other navigable waters; and that the plaintiff has no cause of action under the 21st section, unless the jury find that the death of the plaintiff's intestate was caused by the act of the defendant corporation as distinguished from an act occasioned by the carelessness or negligence of their servants; which instructions the court refused to give, and thereby the defendants claim that they have been prejudiced.

Second. Because the verdict was against the evidence, & the weight thereof, & ought to be set aside. The said defendants herewith sub-
mitting a report of the testimony in support of this ground for a
18 new trial, to which they crave leave to refer with the same effect as if herein at large set forth.

Third. Because the damages awarded by the jury were excessive, & unreasonable.

By their attorneys,

J. A. GARDNER,
B. F. THURSTON, &
A. PAYNE.

(Endorsed:) Motion for new trial. Philip B. Chace, adm'r, vs American Steamboat Co. J. A. Gardner B. F. Thurston, & A. Payne, atty's for defendants. Filed this third day of the March term, A. D. 1871. Henry N. Ward, deputy clerk. Entry & clerk's fees paid, $4.25.

19 September term, A. D. 187I.

At a meeting of the supreme court of the State of Rhode Island, holden at Newport, for and within the county of Newport, on the 3rd

Monday of September, it being the 18th day of the month, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-sixth, there were present—

His Honor George A. Brayton, chief justice; his Honor Thomas Durfee, asso. justice; his Honor Elisha R. Potter, asso. justice; Willard Sayles, att'y gen'l; Thomas S. Tilley, high sheriff, and Thomas W. Wood, clerk.

CHASE, ADM'R,
vs.
AMERICAN STEAMBOAT CO. } 454.

Be it remembered that, at the November term, A. D. 1869, of the court of common pleas for and within this county, Philip B. Chace, of Portsmouth, in said county of Newport, administrator of the estate which was of the late George Cook, late of Portsmouth aforesaid, sueing for the benefit of Sarah Cook, widow of the said George, George Cook, William Cook, Sarah Cook, & Ruth Walker, children of the said George Cook, complained of the American Steamboat Company, a cor-
20 poration created by law & having its place of business located in the city and county of Providence, duly held to answer in an action of trespass on the case:

For that the said defendants at said Providence, to wit, at said Newport, on the 29th day of June, A. D. 1869, were common carriers of passengers between said city of Newport and the city of Providence, over the waters of Narragansett Bay, the same being one of the public highways within the State of Rhode Island, the said def'ts, then and there having in their said service and employment, as carriers of freight and passengers, the steamboat Whatcheer, whereof one Loyd S. Sutton was then and there master, as the servant and agent of the said def'ts, and the pl'fft, avers that, by the reason of the unfitness, carelessness, and negligence of the said Sutton as aforesaid, and of the officers and crew of the said steamboat Whatcheer, all agents and servants of the said def'ts, and of the unfitness of the said steamboat to be used by said def'ts in navigating the said bay & upon the said public highway, the said steamboat was directed, managed so negligently, carelessly, and unskillfully, that it wrongfully was made to run upon and to come
21 in contact with and break and destroy a sail-boat in which the said George Cook, the pl'fft's intestate, was then, in the exercise of due care, being carried over and upon the waters of the said bay & public highway aforesaid, whereby and by means of the unfitness, carelessness and negligence of the said servants and agents of the said def't corporation, the said George Cook received from the said steamboat of the def't a mortal wound upon his back and body, whereof he instantly died; and the pl'fft avers that the said George Cook, his intestate, at the time when he was killed as aforesaid was a man in the full vigor of life, in good health, and was a man of good character, a kind and provident husband, & an affectionate father, and was in the habit of earning and receiving a large amount of money annually from the proceeds of his labor & employment, all of which and the benefit and comfort of his society have been lost to his widow and children, for whose benefit this action has been brought, whereby an action accrued to the pl'fft to have and recover from the def't corporation,
22 the damages which have been sustained by the said widow & children in consequence of the killing of the said George Cook as

aforesaid, which the pl'ff*t* avers to be $50,000, as is laid in his writ dated October 12th, 1869.

Wherefore he sues, by attorney,

W'M P. SHEFFIELD.

Def't plead "general issue;" and the pl'ff joined. And on the third day the def't submitted to judgment for $50,000 and costs; wherefore it was considered by the court that the pl'ff*t* have of the def't fifty thousand dollars damages, and his costs taxed of suit at nine $\frac{40}{100}$ dollars. Def't filed appeal-bond.

All of which fully appears by a transcript under seal and certificate of said court of common pleas, duly filed in this court.

And at the March term, A. D. 1870, of this court, said def't filed their appeal, duly entered of record, and at said March term the def't moved the court to dismiss said action on the ground that under and by virtue
of section 2, article III of the Constitution of the United States,
23 and the 9th section of the act of Congress, approved September 24, A. D. 1789, this court had no jurisdiction of the action and could not, constitutionally, try the same, and the court thereupon sustained said motion and dismissed the action. Whereupon the pl'ff*t* filed a motion for a new trial, on the ground that the said dismissal was erroneous, and the same was allowed, and the motion by agreement of counsel agreed to be argued at Providence, during the vacation. The motion was accordingly heard and argument made by counsel, after which the court delivered the following

Opinion.

POTTER, *J.*

Action of the case brought by the plaintiff as administrator of the estate of George Cook, deceased, to recover $50,000 damages for the benefit of the wife and children of the intestate, for causing the death of the intestate on the waters of Narragansett Bay by a collision. The
action was dismissed on motion of the defendants, on the ground
24 that the State court had no jurisdiction, and the question now comes before this court on a motion for new trial, on the ground of alleged erroneous ruling.

The declaration contained two counts, one under § 16 of ch. 176, of the Revised Statutes, which provides that if the life of any person crossing upon a public highway with reasonable care shall be lost, by reason of the negligence or carelessness of such common carrier (by stage-coach, railroad, or steamboat, or by the unfitness or negligence, or carelessness of their servants, the common carriers or proprietors shall be liable for damages for the injury caused by such loss of life, to be recovered in an action of the case, for the benefit of the husband or widow or next of kin, to be brought by the administrator.

The second is on § 21 of ch. 176:

"In all cases in which the death of any person ensues from in-
25 jury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had not death ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of his or her husband, widow, children, or next of kin, in like manner, and with like effect as in the preceeding five sections provided." The plea is the general issue. The questions involved are, first, whether the United

States courts by the United States Constitution have exclusive jurisdiction in a case like this, resulting from a collision of vessels in the bay, or whether the State courts have concurrent jurisdiction; and second, whether if the State courts would have jurisdiction in a case of ordinary injury, they would have it in a case like the present, where the remedy is given by statute, and was unknown to the old common law.

26 *Origin of the acts.*—The consideration of the first of these questions is necessary to throw light upon, and aid in the determination of the second.

Before the adoption of the Constitution the State had jurisdiction over the bay and over the coasts of the sea, to the extent of the marine league. (Laurence's Wheaton, 321, 933; 6 Dane's Abr., 357, &c.; 3 Hag. Ad. R., 290, 375; De Lovio v. Boit, 2 Gallison, 398, sec. 435; see Johnson's opinion, 12 Wheat., 614.)

This jurisdiction was exercised by its courts of common law. The vice-admiralty court exercised an occasional jurisdiction in cases of prize and violations of the British revenue laws. However, it may have been in other colonies, here the power of the vice-admiralty court was but little regarded. The colony legislature regulated the fees of the admiralty, and imposed penalties on its officers for violating it, and by act of 1746, the superior court of the colony was empowered to issue prohibitions to the admiralty courts.

27 Dane, a good authority on old New England laws and usages, observing that most of the statutes, &c., were intended merely to regulate the plantation trade, the laws of which the colonies were continually violating, goes on to say that at the date of the Massachusetts charter, 1691, the admiralty jurisdiction was "exclusive on the high seas, the common highway of nations, without the territorial line, usually a common shot from the shores; concurrent with the common law on the coasts between the shore and that line, and without the bodies of counties; and within them, only such admiralty limited jurisdiction the said prior statutes gave, and that was the colonial view of the subject;" and after the act of 7 & 8, (William III, ch. 22,) to prevent frauds in trade, "the admiralty geographical sphere remained as before.

28 Some have supposed the members of the convention who formed the United States Constitution had in view this extended admiralty jurisdiction when they provided that the judicial power should extend to "all cases of admiralty and marine jurisdiction." This is not probable, because this extended jurisdiction was deemed by the colonies unconstitutional. * * * "The King's commission to the governor of New Hampshire seems to have extended to all crimes and suspected offences and contracts, even to fresh waters and arms of rivers, &c. The colonies never admitted an admiralty jurisdiction to be legal to this extent." (6 Dane's Abr., 357, 358.)

In the address of the delegates in Congress, in October, 1774, one of the complaints is that the English stamp-act had extended the admiralty jurisdiction "to matters arising within the body of a county," and authorized penalties by forfeitures to be recovered in that court, (Journal, 47;) and among the resolutions of Congress, October, 1774, is one that the respective colonies are entitled to the common law

29 of England," &c. (Ibid., 29.)

And in July, 1775, (ibid., 190,) they renew their complaint against the English government of "enlarging the jurisdiction of the courts of admiralty and vice-admiralty;" (and see ibid., 144, &c., 152.)

The colony and State have always asserted their jurisdiction over Narragansett Bay, and the process of the State courts has always been

served on it. By an act of the legislature, A. D. 1798, that part of the bay, north of Field's Point, was declared to be within the county of Providence, and southward of that point process of any county might be served; of course, all this jurisdiction remains in the State and its courts, which has not been granted to the General Government by the United States Constitution.

And the State legislature has, (as stated in the argument of Mr. Sheffield,) at various times, regulated the fisheries in the bay, the
30 speed of steamboats, the sale of liquors, and prohibited the pollution of its waters.

When the United States Constitution provides that the judicial power of the Union shall extend to all causes of admiralty and maritime jurisdiction, is this grant of power to be interpreted by the State of the admiralty jurisdiction as it was anciently claimed by the admiralty in England, or by the actual state of the jurisdiction in England at the date of our revolution, or by the extent of that jurisdiction as it was practiced in the colonies?

It is not necessary, for the purposes of this case, to go into the history of the controversy in England between the courts of common law and admiralty, which has been so fully gone into in the case of De Lovio v. Boit, 2 Gallison, 398, and in several cases before the United States Supreme Court. So far as maritime torts are concerned, within which class the present case comes, it is admitted that the juris-
31 diction of the admiralty depends on the place. So far as concerned the high seas, which were distinguished in the old English law from the narrow seas, so called, and bays and arms of the sea, the jurisdiction was undisputed; but as to such parts of the arms of the sea as were within the jurisdiction of the counties the courts of common law resisted the jurisdiction of the admiralty; and, for a time at least, entirely excluded them. Dane says, (6 Abr., 356,) "According to 13 Rich. II, ch. 5, the bodies of counties included all lands and waters within the realm of England; and the sea includes all waters without the realm, and * * * the realm includes the narrow seas & the coast." (And see Jacob's Law Dict.; Bac. Abr. 1, (side p.) 623; 4 Inst., 134, 140; Comyn, Admirality, E. 14, and F. 2; Judge Story, in 5 Mason, 300.)

It is enough for the present case to state what is generally admitted, that at the time of our revolution the common-law courts
32 had, at least, a concurrent jurisdiction in England with the admiralty, over marine torts committed in bays and arms of the sea. What then is the effect of the act of 1789? The language is, the district court shall "have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction;" saving to suitors, in all cases, the right of a common-law remedy, when the common law is competent to give it. Is the word exclusive here used in reference to the State courts or to the other United States courts? If the question were a new question it might be reasonably argued that the words, in their connection, "exclusive, original," mean that the original jurisdiction, in such cases, is in the district, exclusive of the circuit court, and such is Chancellor Kent's opinion.

(Kent, Com. I, (side p.) 304, note.)

In several places in the act, where it is intended to exclude the State courts, the words "exclusive of the State courts," are carefully
33 used. Seizures, under the laws of trade, the' being United States laws, would, of course, follow the jurisdiction of the United States courts.

But the Supreme Court of the United States have construed this word "exclusive" to refer to the State courts. It is important to consider that the jurisdiction of the State court depends on the Constitution, and not on the act of Congress. If Congress has not the power to give the United States courts exclusive jurisdiction, then this clause is entirely unnecessary; for the State courts would have the jurisdiction without it; and, if the Constitution, either expressly or by implication, vests the exclusive jurisdiction in the United States courts, Congress could not give any portion of it to the State courts. And, even if the word "exclusive" was used by Congress purposely to exclude the State courts, then the question arises, What does it mean to exclude?
34 Does it only mean to exclude the State courts from exercising admiralty jurisdiction, or does it mean to exclude them from exercising any jurisdiction whatever over certain classes of cases? For example: If a policy of marine insurance is a maratime contract, is the State court therefore excluded from all jurisdiction over such a policy? Salt water, where the tide ebbs and flows, may be within admiralty jurisdiction, and admiralty courts may, therefore, have jurisdiction over offences committed on it; but, suppose two citizens of a State step out into shallow water and fight a duel, are they not punishable by the laws of the State? Chief Justice Marshall answers the question in the affirmative. (United States v. Bevans, 3 Wheaton, 336, 389.) So parè ratione of an assault or other offence.

In the trial of Bruce before the admiralty court for murder in Milford Haven, the opinion of the twelve judges was taken as to the jurisdiction. The jurisdiction was sustained, but most, if not all, of the judges seemed to think the common law had a concurrent jurisdiction. (2,
35 Leach's Crown Cases, cited in Bevan's case.) And Hale (2 P. C., 12,) lays it down that the King's Bench had concurrent jurisdiction of felonies on the narrow seas, because, though out of the body of a county, they were within the realm. So in cases of civil actions for torts; e. g., collision, if on high sea or in harbor, the admiralty court may have jurisdiction to give damages for it on account of its taking place on tide water; but it is believed that the courts of common law have always exercised jurisdiction in these cases. The cases which support the admiralty jurisdiction in this and other classes of cases, assert that jurisdiction, in opposition to the common-law decisions, which excluded the admiralty, and do not undertake to assert an exclusive jurisdiction over that whole class of cases. Suits for collision on the Thames were sustained at common law, because held to be within the body of a
36 county. (Bac. Abr., 3; Dwinf & East, 351, Cro. Jac., 514; and see 2 Hale, P. C., 16.) In fact, the admiralty jurisdiction was denied there. The Supreme Court of the United States, in 6 How., 344, 390, say: "The common-law courts exercise a concurrent jurisdiction in nearly all the classes of admiralty cognizance, whether of tort or of contract, with the exception of proceedings in rem."

Judge Story, in his Commentaries on the Constitution, (edition of 1833, vol. 3, § 1666, note,) says the admiralty jurisdiction "is exclusive in all matters of prize, for the reason that, at the common law this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law; but, in cases where the jurisdiction of the courts of common law and the admiralty are concurrent, (as in cases of possessory suits, mariner's wages, and marine torts,) there is nothing in the Constitution necessarily leading to the conclusion that the juris-
37 diction was intended to be exclusive; and there is as little ground, upon general reasoning, to contend for it. The reasonable inter-

pretation of the Constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. * * * This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction, than cases of common-law jurisdiction."

And Chancellor Kent holds to the same doctrine. (See Kent Com. 1, (side p.) 395, 400, citing the Federalist, No. 82, and Judge Washington's approval of it, in Houston v. Moore, 5 Wheaton I; and in the oft-cited case of De Lovio v. Boit, A. D. 1813, 2 Gallison, 398, 445.)

Judge Story, after excepting prize cases, says that "in all
38 others, the common law has not acquired or claimed a concurrent jurisdiction." Judge Story was in that case asserting the concurrent, not exclusive, jurisdiction of the admiralty courts. (And see pp. 422, 476, &c.) If, because admiralty has a jurisdiction in these cases, the common-law courts, therefore, have none, it would sweep into the Federal courts a very large portion of the litigation of the seaboard States.

These considerations may seem not pertinent to the case on hand, but they are of importance in determining what is the meaning of the saving clause in the act of 1789.

The defendants contend that the jurisdiction of the State court depends on this clause and on this alone; that it is confined to the common-law remedies as they existed before the adoption of the United States Constitution; and that, therefore, the act giving an admin-
39 istrator the right to recover damages for injury to a family by a death, caused by the wrongful act of another, being a new right of action, and not existing at common law, is not within the saving clause; and, therefore, the State court has no jurisdiction. If, as we have said, the jurisdiction of the State courts does not depend entirely on the act of Congress, then, this clause would not effect the question of concurrent jurisdiction, except as showing the sense of Congress that the word "exclusive" was not intended to take it away and should not be so construed.

We may well admit, there are whole classes of cases where the Federal courts have jurisdiction, entirely exclusive of State courts, namely: Prize cases, seizures under the United States revenue laws, and cases arising under United States statutes, where the statute gives them jurisdiction, cases in which the United States Constitution expressly gives them jurisdiction, and other cases in which, by implication,
40 their jurisdiction is exclusive, or may be made so by Congress.

If in any of the cases in which the State courts retain jurisdiction there is danger of our foreign relations being affected, Congress may provide for their removal into the Federal courts. (See McLeod's case.)

But even if the jurisdiction of the State courts does depend on this proviso, what is the meaning of it? Is it confined to common-law remedies, as they actually existed in 1789, and does it prevent the States from granting any new right or remedy to be pursued according to the course of common law?

The reasonable construction, as it seems to us, is that it intends to vest in the United States courts the whole jurisdiction. The admiralty courts of England and the colonies exercised, or generally, the whole admiralty jurisdiction, (by whatever rule defined,) exclusive where
41 it was exclusive and concurrent where it was concurrent; but that in these latter cases the courts of common law could not pro-

ceed by admiralty process; in other words, that if the suitor chose to resort to an admiralty remedy he must do it in an admiralty court. Mr. Justice Miller, in the opinion of the United States Supreme Court, in Hine v. Trevor, (4 Wallace, 555,) and Mr. Justice Field, in the Moses Taylor, (4 Wallace, 411,) while holding that the admiralty jurisdiction was exclusive in the Federal courts, place the ground of those decisions on the fact that the proceedings provided for in the State laws, which were declared void in those cases, were admiralty proceedings—were proceedings in rem. Mr. Justice Field observes that the remedy by the State law was in no sense a common-law remedy. The vessel was made defendant without mentioning the owners, &c.; and he well observes that it could not have been the intention of Congress to
42 give the suitor all such remedies as might afterward be enacted by State statutes; for that would enable them to make the jurisdiction concurrent in all cases, and so defeat the exclusive jurisdiction of the Federal courts. And Mr. Justice Miller observes, it is not a remedy in the common-law courts that is saved, but a common-law remedy. "A proceeding in rem is not a common-law remedy," &c.

The objection here is, not that a new right was given, but that it was to be enforced by the process peculiar to the admiralty courts.

In Waring v. Clarke, (2 Howard. 441, 457,) Mr. Justice Wayne, in delivering the opinion of the majority of the United States Supreme Court and replying to the argument that the admiralty jurisdiction was confined to the cases in which it formerly existed in England, says that that construction would, in effect, take away from the courts the interpretation of the provision, and would prevent all future legisla-
43 tion on the subject; and therefore, this limitation could not have been intended. The argument seems to us to be equally strong, that Congress could not intend by this proviso, to confine the remedy to the common law as it anciently existed, and to prevent the extension of a right, or all alteration of process or form of remedy. If so, what would be the effect in New York and those States which have, by their new codes, abolished all the old common-law forms and remedies?

The intention, therefore, must be, giving the clause a liberal construction, to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from the course of admiralty, and there is nothing in the opinions we have cited against this construction.

Judge Nelson, in the United States Supreme Court, (N. J. S. Nav. Co. v. Merchants' Bank, 6 Howard, 344, 390,) says: "The
44 saving clause was inserted probably from abundant caution lest the exclusive terms in which the power is conferred on the district courts might be deemed to have taken away the concurrent remedy which had before existed. This leaves the concurrent power where it stood at common law." And the United States Supreme Court, (in The Eagle, 8 Wallace, 15,) in speaking of the saving clause in the additional act of 1845, which saves "to the parties the right of a concurrent remedy at the common law where it is competent to give it, and any concurrent remedy which may be given by the State laws," hold that this saving clause "is, in effect, the same as in the act of 1789." We have here the opinion of the whole court, without dissent, giving a construction to the saving clause in the act of 1789, agreeing with the construction we have given to it, and which we consider the most reasonable. A new trial must, therefore, be granted.

45 A new trial being thus ordered, the cause was thence continued to the September term, A. D. 1870, when the same came on to be

tried by a jury, duly empaneled and sworn, to try the same; and, upon trial, the said jury found the defendant corporation guilty, in manner and form as the pl'ff*t* had against it declared, and assessed damages for the pl'ff*t* in the sum of $12,000: Whereupon the def't filed a motion for a new trial on the ground of alleged erroneous rulings and *and* instructions of the court at the trial, which were allowed and argued by counsel, pursuant to agreement of said counsel at Providence. Said cause was continued from term to term until the second day of the present , when the motion for new trial was dismissed. Wherefore it was considered by the court that the pl'ff*t* have and recover of the def't twelve thousand six hundred fourteen dollars damages,
46 and his costs of suit taxed at one hundred twenty-five $\frac{25}{100}$ dollars.

Def't gave bonds and filed writ of error issuing out of the United States court.

47 PHILIP B. CHACE, ADMINISTRATOR,
vs.
THE AMERICAN STEAMBOAT COMPANY.

To the honorable the justices of the supreme court of the State of Rhode Island:

The petition of the American Steamboat Company, defendants in the above-entitled case, respectfully represents:

That, at the November term, A. D. 1869, of the court of common pleas, the plaintiff, as administrator of the estate of George Cook, late of Portsmouth, deceased, brought an action in the case against the defendant company, to recover the sum of $50,000 damages, for the benefit of the widow and children of his intestate, because, as was alleged in said action, the defendant corporation, by the negligence and carelessness of their officers and servants, caused the death of his said intestate on the 29th day of June, A. D. 1869, by running down the plaintiff's intestate by their steamboat, called the "Whatcheer," while he was in the act of crossing upon the waters of Narragansett Bay, (the same being waters navigable from the sea,) in a fishing-boat, reference to the declaration in said case being had.

To this action, the defendants pleaded the general issue; and, submitting to judgment for the plaintiff at said term, removed the case upon appeal, to the March term, A. D. 1870, of this honorable court for said county of Newport.

48 And these defendants further represent that said cause came on to be tried before the court and jury at the September term, A. D. 1870, and a verdict was rendered for the plaintiff, that he have and recover against the defendants, damages for the injury complained of, in the sum of twelve thousand dollars.

And these defendants further represent that, upon the trial of said action, there was drawn in question, the validity of a statute of the United States, that is to say, the said defendants claimed that, under and by virtue of sec. 2. art. III, of the Constitution of the United States, and the 9th section of the act of Congress, approved September 24th, A. D. 1789, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is vested in the district courts of the United States, saving only to suitors, in all cases, the right of a common-law remedy, when the common law is competent to give it; and that this honorable court had no jurisdiction of the cause of action, for the reason that said injury was the result of a collision between two

vessels, occurring upon the navigable waters of Narragansett Bay, and that, as the right of action claimed in favor of the plaintiff for the consequences of the injury happening to his intestate, was created solely by the provisions of sections 16 and 21, of chapter 176, of the Revised Statutes of Rhode Island, which sections are modifications of sections of an act of the general assembly of Rhode Island, entitled An
49 act in relation to cases where life is lost by the wrongful act or negligence of common carriers and others, passed at the October session, A. D. 1853, and did not exist at the common law; the rights of the plaintiff were not saved by the proviso contained in said 9th section of the act of Congress aforesaid, and jurisdiction of the said cause of action could not be constitutionally exercised by said court.

And these defendants further represent that the decision of this honorable court was adverse to these defendants upon the question of jurisdiction so by them raised; and, on the contrary, held that it had jurisdiction of the cause of action as appears of record; and that afterwards, to wit, on the eighteenth day of September A. D. 1871, a final judgment was entered by this honorable court for the plaintiff, that he have and recover from the defendants the sum of $12,614.00 damages, & costs of suit taxed at $125.25.

Wherefore, these defendants, your petitioners, pray that a writ of error may be allowed in said cause returnable to the next term of the Supreme Court of the United States to be holden at Washington, on the first Monday of December next, to the end that the said Supreme Court may cause further to be done therein, to correct any error what of right, and according to the laws and customs of the United States, should be done.

AMERICAN STEAMBOAT CO.
By JA'S T. RHODES, *Pres't.* [SEAL.]

50 (Endorsed:) Petition of the American Steamboat Co. for writ of error, in Philip B. Chace, adm'r, v. American Steamboat Co. Filed Sep. 19, 1871. Thos W. Wood, cl'k.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of Rhode Island, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, within and for the county of Newport, in said State of Rhode Island, before you or some of you, being the highest court of law and equity of the said State in which a decision could be had in the suit between Philip B. Chace, administrator of the estate of George Cook, deceased, vs. The American Steamboat Company, a corporation created by the general assembly of said State of Rhode Island, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a
52 manifest error hath happened to the great damage of the said

American Steamboat Company, as by their complaint appears: We, being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the nineteenth day of September, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] HENRY PITMAN,
Clerk U. S. Circuit Court, R. I. Dist.

Allowed by—

GEO. A. BRAYTON,
Chief Justice of the Supreme Court of Rhode Island.

53 (Indorsed:) Writ of error. Philip B. Chace, adm'r, vs. American Steamboat Co., plff's in error. Filed Sep. 19, 1871. Tho's W. Wood, clerk.

54 Know all men by these presents that we, the American Steamboat Company, a corporation created by the general assembly of the State of Rhode Island, located and doing business in said State, as principal, and Benjamin Buffum and James T. Rhodes, both of the city & county of Providence, in said State, as sureties, are held and firmly bound unto Philip B. Chace, administrator of the estate of George Cook, late of Portsmouth, in the county of Newport, in said State, deceased, in the full and just sum of twenty thousand dollars, to be paid to the said Philip B. Chace, administrator as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, & successors, jointly and severally, by these presents, sealed with our seals, and dated this nineteenth day of September, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas, lately, at a supreme court of the State of Rhode Island, holden at Newport, within & for the county of Newport, on the third Monday of September, A. D. eighteen hundred and seventy-one, in a suit depending in said court between Philip B. Chace, administrator, vs. The American Steamboat Company, judgment was rendered against
55 the said American Steamboat Company, and the said American Steamboat Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Philip B. Chace, administrator, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said American Steamboat Company shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN STEAMBOAT CO., [SEAL.]
By JA'S T. RHODES, *Pres't.*
BENJAMIN BUFFUM. [SEAL.]
JA'S T. RHODES. [SEAL.]

Sealed and delivered in the presence of—
JOHN A. GARDNER.

Approved by—

GEO. A. BRAYTON,
Chief Justice.

(Endorsed:) Bond for damages & costs on writ of error. Philip B. Chace, adm'r, vs. American Steamboat Co., plff's in error. Filed Sep. 19, 1871. Tho's W. Wood, clerk.

56 The United States of America to Philip B. Chace, administrator of the estate of George Cook, late of Portsmouth, in the county of Newport, in the State of Rhode Island, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Rhode Island for the county of Newport, wherein The American Steamboat Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and seventy-one.

GEO. A. BRAYTON,
Chief Justice of the Supreme Court.

57 STATE OF RHODE ISLAND, &C., *Newport, sc:*

In the town of Portsmouth, in said county of Newport, on this twenty-seventh (27th) day of September, A. D. 1871, I have this day, at twenty minutes past eight o'clock a. m., served the within-named Philip B. Chace, administrator, in hand, with a true and attested copy of the within citation.

W'M D. LAKE,
Deputy Sheriff.

STATE OF RHODE ISLAND, &C.,
Newport, Rhode Island District, sc:

In the city of Newport, on this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-one, personally appeared W'm D. Lake, before me, the subscriber, and makes oath that he delivered a true and attested copy of the within citation in hand to Philip B. Chace, administrator of the estate of George Cook, late of Portsmouth, Rhode Island, deceased, this day, at twenty minutes past eight o'clock a. m., and that he has no interest in the case in which this citation issues.

W'M GILPIN,
Com'r Circuit Court U. S., Rhode Island District.

(Indorsed:) Filed Sep. 27, '71. Tho's W. Wood, clerk.

58 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Newport, sc:

PHILIP B. CHASE, ADMINISTRATOR,
vs.
AMERICAN STEAMBOAT COMPANY.

And now the judges of the supreme court of said State for the county of Newport, make return of the writ of the Supreme Court of the United States to them directed in the above-entited cause, by annexing hereto, and transmitting herewith, under the seal of said court, as by said writ commanded, a true and attested copy of the record and process in the above-entitled suit, and of all proceedings therein, and all things concerning them.

In testimony whereof I, Thomas W. Wood, clerk of the said court within and for said county of Newport, have hereunto set my hand and the seal of said court this eleventh day of November, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.]

THO'S W. WOOD,
Clerk of Supreme Court for the State of Rhode Island and County of Newport.

(Indorsement on cover:) No. 395. The American Steamboat Company, plaintiff in error, vs. Philip B. Chace, adm'r of George Cook, dec'd. Rhode Island sup. court. Filed 22d November, 1871.

Supreme Court of the United States.

THE AMERICAN STEAMBOAT CO.,

PLAINTIFF IN ERROR,

VS.

PHILIP CHASE,

ADMINISTRATOR OF GEO. COOK.

BRIEF FOR PLAINTIFF IN ERROR.

PROVIDENCE:
PRINTED BY THE PROVIDENCE PRESS COMPANY.
1873.

Supreme Court of the United States.

THE AMERICAN STEAMBOAT CO.

vs.

PHILIP B. CHACE, ADM'R. OF GEORGE COOK, DECEASED.

No. 160.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 29th of June, 1869, a collision occurred between the steamboat "What Cheer" and a fishing boat, on the waters of Narragansett Bay, from the result of which the defendants intestate lost his life. The steamboat was owned by the plaintiff in error, and was employed to convey passengers between the cities of Providence and Newport.

The Statute of Rhode Island gives a right of action to the representatives of a person who has sustained injury resulting in death, by the carelessness or misconduct of another, as follows:

Revised Statutes, Chapter 176.

OF ACTIONS.

"SEC. 16. If the life of any person, being a passenger in any stage coach, or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroad or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this State, such common carriers, proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action on the case, for the benefit of the husband or widow and next of kin of the deceased person, one moiety thereof to go to the husband or widow, and the other to the children of the deceased.

"SEC. 21. In all cases in which the death of of any persons ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the

death of such person, to be recovered by action of the case for the use of his or her husband, widow, children, or next of kin, in like manner and with like effect, as in the preceding five sections provided."

An action of trespass on the case was commenced before the Court of Common Pleas at the November term, 1869, to recover damages from the Steamboat Company, for having occasioned the death of the defendant intestate. The same was removed by appeal to the Supreme Court, and was tried before a jury at the September Term, A. D. 1870. The trial resulted in a verdict for damages for the plaintiff in the sum of $12,000, and afterwards at the September Term, 1871, a final judgment was entered on the verdict.

Upon the trial of the case, it was claimed by the plaintiff in error, that the Court had not jurisdiction of the cause of action on the ground that under the Constitution of the United States and the Act of Congress, approved September 24, 1789, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is vested in the District Courts; that the Courts of Common Law have only such jurisdiction of marine torts as is conferred by the sav-

ing clause in the 9th section of the act and that actions for damages for loss of life, do not come within the clause.

The Court, after full argument, overruled the objections of the plaintiff in error, and sustaining the jurisdiction of the Court, proceeded to try the action and render final judgment.

Upon the 19th of September, 1871, a writ of Error was sued out, and the cause removed to this Court.

The question raised upon the record and presented to this Court for decision, is: Can a Court of Common Law exercise jurisdiction and give a remedy to a suitor for a consequential injury growing out of a marine tort, when no remedy for such injury exists in the admiralty?

Or assuming that under the general jurisdiction of Courts of Admiralty, cognizance of such action could be entertained by a District Court of the United States. Can a suitor have a remedy in a Court of Common Law, when the right to such action is created by a State Statute, passed subsequent to September 24th, 1789.

We are not aware that this question has been distinctly raised or collaterally adverted to in any previous case, but we shall submit that the

necessary answer will be found in the legitimate deductions from the principles involved in the decisions of this Court relating to the relative jurisdictions of the Admiralty and Common Law Courts, from *Waring* v. *Clark*[1] in 1846 to *The Eagle*[2] in 1868.

THE GRANT OF COGNIZANCE OF CAUSES OF ADMIRALTY JURISDICTION EXCLUSIVE TO THE DISTRICT COURTS.

The Constitution, Sec. II, Art. III, declares that the judicial power of the United States shall extend "to ALL cases of admiralty and maritime jurisdiction," and this clause has been construed to import a broad grant of power under which Congress can by legislation rightfully vest exclusive jurisdiction in the Federal Courts.[3]

The Judiciary Act of 1789, (1 Statutes at Large 73,) in its distribution of jurisdiction to the several Federal Courts, recognizes this power as conferred by the Constitution, and the 9th section of the Act invests the District Courts with the right to take "*exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction." By the same section a common law remedy is saved to suitors, in certain cases the

(1.) *Waring* v. *Clark*, 5 Howard, 451.
(2.) *The Eagle*, 8 Wallace, 15.
(3.) *The Lexington*, 6 Howard, 344; *The Moses Taylor*, 4 Wallace, 429; *The Belfast*, 7 Wallace, 638,

the effect and scope of which will properly be considered hereafter.

MEANING OF THE TERMS "CAUSES OF ADMIRALTY AND MARITIME JURISDICTION."

The words "causes of admiralty and maritime jurisdiction," are of the same import as if the language had been—"causes which arise out of acts committed on, or contracts to be executed on the sea."[1] Exclusive cognizance is given to the District Courts of *subjects* of a maritime character, or to express it loosely of all matters happening upon the sea. The extent of the congnizance conferred is not wholly comprehended in the right to employ civil law forms of procedure, as for example, making an impersonal subject a defendant, but embraces among other subjects all controversies which are recognized as pertaining to marine torts or contracts. State Courts may enforce a mechanics' lien for labor and materials furnished in the erection of a house, and there is nothing to forbid a State legislature from authorizing the suitor to proceed by petition or libel against the thing on which he claims a lien—but if the cause of action be founded upon a marine tort or maritime contract, then the State Courts are forbidden to exercise jurisdiction, unless the case come with-

(1) *Dunlap's Ad. Prac.* p. 41: *DeLovio* v. *Boit*, 2 Gall. 468-471.

in the saving clause of the 9th section of the Act of 1789. That the terms "causes of admiralty and maritime jurisdiction," mean what we contend for, seems clear from the words of the saving clause, which are to be read as if they were expressed "saving to suitors in all cases (of admiralty and maritime jurisdiction) a common law remedy, etc.

In the present case it is unnecessary to argue that a collision between two vessels occurring upon the waters of Narragansett Bay, is a cause of admiralty cognizance. From the subject as well as from locality it is clearly a matter with which the Admiralty has to do,[1] and irrespective of the question whether the vessels were engaged in foreign commerce or in commerce between the States.[2]

We claim that it was the purpose and intent of the Constitution and of Congress acting in the spirit of the framers of the Constitution to create a maritime court for the purpose of administering the universal law of the seas upon the basis of the civil system, known to maritime States, in distinction from a Court familiar only with the limited jurisprudence of the common

(1.) *Waring* v. *Clark*, 5 Howard, 441; The *Lexington*, 6 Howard, 394; The *Magnolia*, 20 Howard, 296; The *Belfast*, 7 Wallace, 637.

(2.) The *Commerce*, 1 Black, 578.

law system. "This exclusive jurisdiction in admiralty cases was conferred on the national government as closely connected with the grant of the commercial power."[1]

AUTHORITY OF COMMON LAW COURTS OVER SUCH SUBJECTS OF CONTROVERSY DERIVED FROM SAVING CLAUSE OF SEC. 9.

The authority of Courts of Common Law to exercise on behalf of suitors, any jurisdiction whatever over marine torts, or over any causes which from character or locality belong to the jurisdiction of the admiralty, is obtained entirely from the 9th section of the Act of 1789. The arguments of those eminent lawyers who on different occasions have strenuously contended that the Admiralty jurisdiction in this country was hemmed in by the restrictions which were imposed upon the English Courts of Admiralty by the statutes of 13th, Richard II. and 2d of Henry IV. have failed to satisfy this Court that there was any other legitimate source to resort to for the bounds of the Admiralty jurisdiction than the Constitution of the United States, the laws of Congress and the judicial interpretation given to the Constitution and laws by this Court.[2] As this grant of jurisdiction embraces all subjects

(1) The *Lexington*, 6 Howard, 392.
(2) The *Belfast*, 7 Wallace, 636.

which from their nature belong to the admiralty and is exclusive in its general character,[1] it follows of necessity that the Federal and the State Courts of Common Law, have no other jurisdiction over the same subjects, than that which is conferred by the saving clause of the 9th Section of the Act of 1789, which is in the words "*saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.*"[2]

STATUTORY ACTIONS FOR DAMAGES FOR LOSS OF LIFE RESULTING FROM A COLLISION ON NAVIGABLE WATERS ARE NOT SAVED.

The next inquiry, properly is, whether an action for damages by an administrator for the loss of life by his intestate, resulting from a collision of two vessels on navigable waters, is given to him in the Common Law Courts by the same clause above quoted. It undoubtedly is, if a right of action for such cause was known to the Common Law at the time of the passage of the Act. For if then known to the Common Law, it would have been known to and recognized by the Admiralty. But if unknown to the Common Law and unknown to the Admiralty, and

(1) *The Genesee Chief*, 12 Howard, 457; *The Hine*, 4 Wallace, 556.

(2) The *Moses Taylor*, 4 Wallace, 412.

not since by legislation of Congress given to the Admiralty, it cannot have been *saved* to the Common Law Courts, either directly or by implication. Neither was such remedy saved if known to the Admiralty, and unknown to the Common Law. Not only are the remedies which are saved confined to Common Law remedies,[1] but only such concurrent remedies are saved as the Common Law was then competent to give. In the *Hine* v. *Trevor*, the Court remarked, "It could not have been the intention of Congress by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their Courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal Courts would be defeated. In the Act of 1845, where Congress does this, the language expresses it clearly, * * * there is added "any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed."[2]

It is not to be presumed that it was the intention of Congress, at the moment that it was giving to the Federal Courts the exclusive cognizance of civil causes of admiralty jurisdiction, to

(1) *The Moses Taylor*, 4 Wallace, 431.
(2) *The Hine*, ibid. 572.

save to the Common Law Courts any greater *right* than it conferred upon the Admiralty Courts. It is an existing Common Law remedy which is saved to suitors *for rights recognized by the Admiralty.*

It is important to observe that the privilege is a personal one to *suitors.* It is not a jurisdiction conferred on Courts, or a power vested in State legislatures to create new rights of action, affecting subjects coming within the law of the sea. "It is evident," say the Court in the *Belfast*,[1] "that Congress intended by that provision, to allow the party to seek redress in the Admiralty, if he saw fit to do so, but not to make it compulsory in any case where the Common Law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the Admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into Admiralty at all, and may resort to his Common Law remedy in the State Courts, or in the Circuit Court of the United States, if he can make proper parties to give that Court jurisdiction of his case." No where have the Courts intimated that claims founded on marine torts, where the right of the party to proceed *in rem*, or *in personam*, in the

(1) *The Belfast*, 7 Wallace, 144.

Admiralty to enforce such claims is not rec nized, he can pursue such claims under a right given by State laws, in the Common Law Courts.

A suit to recover damages for loss of life, resulting from a collision of two vessels on the seas, is a cause essentially in its nature proper for Admiralty cognizance, and by the Act of 1789, if cognizable anywhere, is exclusive cognizable in the Admiralty. And if, from an omission by Congress, whether intentionally or inadvertently, to create this new statutory right, such cases cannot be proceeded for in the Admiralty Courts, then it follows that until such legislation is had, the remedy does not exist. This state of things, is no greater hardship on suitors, than formerly existed in the several States, who, have in recent times enacted statutes giving an action for damages where death results from a tort, and in some of the States, at this day, no such right in derogation of the Common Law has been created.

In the distribution of judicial powers, by the Act of 1789, it was intended that the Federal Courts of Common Law should have a jurisdiction, (where the citizenship of the parties would admit,) concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dis-

pute exceeds a specified limit.[1] Thus it follows, that whenever a new right is conferred by State laws upon a party, it can, if there be no objection on account of citizenship, or amount in controversy, be made the subject of adjudication in the Federal Courts of Common Law.

On the other hand, it is clear that all subjects of recognized admiralty cognizance, may be dealt with by the Common Law Courts, provided, such Courts were at the time of the act competent to deal with them, and it is not necessary to deny that all rights which since 1789, have been, or may be, hereafter conferred by Congress upon suitors in the Admiralty, may be followed by proper State legislation, and be dealt with according to the proper forms by the Courts of Common Law.

REMEDY AT COMMON LAW MUST BE A CONCURRENT ONE.

We insist therefore that the Courts of Common Law, have only the right to exercise a *concurrent* jurisdiction over such subjects of Admiralty cognizance, as they under the Constitution and the Acts of Congress are permitted to deal

(1) Sec. 11. 1 Statutes at Large, 73; *Railway Co.* v. *Whitton*, 13 Wallace, 287.

with at all. In the case of the *Lexington*,[1] the Court say, in speaking of the saving clause in the 9th section of the Act of 1789: "The meaning of the clause, we think apparent. By the Constitution, the entire Admiralty power of the country is lodged in the Federal judiciary, and Congress intended by the ninth section to invest the District Courts with this power as Courts of original jurisdiction. The term "exclusive original cognizance," is used for this purpose, and is intended to be exclusive of the State as well as of the other Federal Courts. The saving clause, was inserted probably from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts, might be deemed to have taken away the *concurrent* remedy which had before existed. This leaves the *concurrent* power where it stood at common law."

Again, in *The Hine*,[2] the Court say, "It must be taken therefore as the settled law of this Court, that whenever the District Courts of the United States have original cognizance of Admiralty causes by virtue of the Act of 1789, that cognizance is exclusive, and no other Court, State or national, can exercise with the excep-

(1) *N. J. S. Nav. Co.* v. *Merchants Bank*, 6 How. 390.
(2) *The Hine* v. *Trevor*, 4 Wallace, 568.

ception always of such *concurrent* remedy as is given by the Common law."

By the Act of 1845,[1] "extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same," the saving clause is in these words, "and saving also to the parties the right of a *concurrent* remedy at the Common Law where it is competent to give it, and any *concurrent* remedy which may be given by the State laws." The Court in pronouncing this Act to be obsolete as to all its provisions, with the exception of the clause giving to either party the right of trial by jury when requested; in referring to the saving clause above quoted, say,[2] "The saving clause in this Act as to the *concurrent* remedy at Common Law, is in effect the same as in the Act of 1789, and is therefore useless and of no effect.

In *Martin* v. *Hunter's*, lessee,[3] the Court observe, "The admiralty and maritime jurisdiction is of the same exclusive cognizance, and it can only be in those cases where previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a *concurrent*

(1) 5 Statutes at Large, 726.
(2) *The Eagle*, 8 Wallace, 25.
(3) *Martin* v. *Hunters*, lessee, 1 W. 387.

jurisdiction. Congress, throughout the Judicial Act, and particularly in the 9th, 11th and 13th sections, have legislated upon the supposition that in all cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own Courts."

There is an obvious propriety in excluding the Courts of Common Law from adjudicating upon subjects, which are from their nature of admiralty cognizance, except to the extent recognized and permitted by the Acts of Congress. A jury of landsmen unfamiliar with the rules and necessities of navigation, is imperfectly qualified to administer justice in a case, the turning point in which, on the question of liability, can be settled only after a skilled and intelligent weighing of acts done by the respective parties in the exercise of a science requiring special knowledge and aptitude to understand.

Some of the States on the seaboard assume by statute to define the extent of their jurisdiction over the navigable waters upon which they border. The State of Rhode Island at the time when this cause of action arose, did not claim any jurisdiction upon the high seas, but pending this case, a revision of its statutes had been made, and it now claims jurisdiction to the dis-

tance of one marine league from the shore. There is nothing to prevent the State at any future time, at the caprice of its legislature, to assert a more extensive jurisdiction, and proceed to take cognizance of all torts and controversies in its Common Law Courts, affecting its citizens, although occurring anywhere on the high seas. If permitted to confer new rights on parties affected directly or collaterally by injuries committed on the seas, it will be easy for the States under forms of procedure which resemble more or less closely those of the Common Law, to strip the Admiralty of all, except the memory of a former jurisdiction.

It seems to us that the grant of jurisdiction by the Constitution to the Federal Courts of all cases of Admiralty and maritime jurisdiction, and the broad declaration by the Act of 1789, that such jurisdiction is exclusive of all State and Federal Courts of Common Law, is poorly satisfied by the declaration that all that is thus exclusively vested, is a right to proceed *in rem*, and that the Common Law Courts are only prohibited from making an inanimate object a defendant. If a form of procedure respecting a subject, and not the subject itself, is all that distinguishes the exclusive jurisdiction of Courts of Admiralty from Courts of Common Law, then much learn-

ning and zeal in argument has been wasted before this Court and by the bench, in the effort to define and settle the limits of these two ancient conflicting jurisdictions.

It may be urged on the part of the defendant in error, that the present case is not a cause of admiralty cognizance within the meaning of the Act of 1789, and that the right of the suitor to proceed in a Common Law Court, is therefore not derived from the saving clause of the ninth section. The statute of Rhode Island imposes a new liability for a tort and creates a new right in favor of persons who, if death had not resulted from the tort committed, would have had no cause of action whatever for any injury happening to the person affected, however severe and disabling to him. Had the action been brought by George Cook, whether in the Admiralty or at Common Law, the measure of damages which he could recover, would be the extent of the injury which he had sustained, and among the elements to be considered, would be the pain and suffering to which he had been subjected. The present action is to recover the value of the life of George Cook to his family, and the amount of pain, which before death occurred, he suffered from the injury is not an element to be considered in estimating that value. The

damages to the person are measured by one rule, and the damages to the family by a different rule. The injury to the person is direct. The injury to the family is remote, indirect, and consequential, and the liability of the Steamboat Company a creation of the statute.

The cause of action, whether the suit be in the name of the sufferer, for damages for an injury to the person, not resulting in death, or in the name of the administrator for an injury to the family by occasioning a death, is founded upon the same tort; and if a collision upon the seas is a subject exclusively cognizable in the District Court, all actions founded on such collision as a ground of claim for damages whether direct or consequential, resulting therefrom, cannot be proceeded with in any other Court, except as authorized by the Act of Congress. State legislation may give a right to creditors of a person losing his life by the wrong of another, to recover their debts from the party, by the fault of whose servants the injury is caused, but such would not be a new remedy for an existing right, but an imposition of a new liability upon the one party and the conferring of a new right upon the other party.

The argument for which we contend is aided by the legislation of Congress, since 1789. The

Act of March 3d, 1851,[1] limits the liability of ship owners for "any loss, damage, or injury by collision to the owners interest in the vessel and freight. If Courts of Admiralty had the right to give to suitors damages for injuries from a collision, resulting in loss of life, then in any such suit, the shipowner could set up the protection against an indefinite liability afforded by the Act of 1851. This Court has at the last term, and since the present action was removed on writ of error, provided general rules under which suits at Common Law against shipowners, although properly instituted under the saving clause of the 9th section of the Act of 1789, can be restrained, and all further proceedings be had under the direction of a Court of Admiralty, with liberty to the owners to contest their liability, or the liability of the vessel, independently of the limitation of liability claimed under the Act. Without such regulation, it would be impossible for defendants to obtain the benefit of the limitation in cases where they were sued or held to answer by attachment of their vessel before Courts of Common Law, who have no adequate machinery for giving effect to the provisions of the Act. While Congress has deemed it proper to give to suitors a concurrent remedy

(1) 9 Statutes at Large, 635.

in the Common Law Courts, it is clear that by the Act of 1851, it has given a right to defendants, which, if claimed by them, essentially qualifies such Common Law remedy, and practically transfers the controversy to a Court of Admiralty jurisdiction.

It will not be contended by the defendant in error, that an action for damages for an injury resulting in loss of life, could have been maintained at the Common Law in the State of Rhode Island, before October, 1853. The innovation was not made in England until 9 Vic. 1846, by the statute known as Lord Campbell's Act. There, was no legislation on this subject by any State earlier than the English statute, and most of the statutes are substantial copies of the English statute.

No civil remedy to next of kin, for damages consequent upon an injury resulting in loss of life of their relative, is known to the Admiralty. Congress has made it criminal to occasion a loss of life by negligence of duty, (Act of 1871, Sec. 57, C. 100, 16 Statutes at Large, 456,) but it has not given any civil remedy for damages to the persons interested in such life.

Actions in the Admiralty for mere personal torts, do not survive the death of the person in

jured,[1] *Actio personalis moritur cum persona*, is a maxim of the civil law and *a fortiori* suits on behalf of surviving relatives, for an injury sustained by them from the death of a person, are at present unknown to the Admiralty. It is entirely competent for Congress to adopt State legislation upon this subject, and enlarge the rights of suitors in causes of Admiralty and maritime jurisdiction, as it has already given effect to State laws on the subject of pilotage, but until this legislation has been had, shipowners are not liable to suits for damages for a loss of life occurring from a collision upon the seas.

The entire original jurisdiction of civil causes of Admiralty is vested in the District Courts, save only that suitors have the privilege of a Common Law remedy; for the same causes if the Common Law is competent to give it. With respect to subjects of recognized Admiralty cognizance at the time of the passage of the Act of 1789, the State legislatures could provide Common Law remedies, and may by subsequent legislation enlarge or modify these remedies—preserving always the distinctive characteristics of Common Law procedure. But the case is different with respect to subjects not of recognized Admiralty cognizance. If State legislation can

(1) *Hall's Admiralty Prac.* 21; *Dunlap's Admiralty Prac.* 87; *Crapo's Admr.* vs. Allen, 1 Sprague, 184.

create new liabilities against, and confer new rights upon the parties to a cause of Admiralty cognizance, then the jurisdiction is no longer exclusive in the Federal Courts, but is as to such subjects, until Congress competes in the race of legislation, exclusive in the State Courts.

The summary of the positions upon which we rely is

I. Exclusive original cognizance of all maritime causes is vested by the Constitution and Acts of Congress in the Districts Courts of the United States.

II. A concurrent jurisdiction can be exercised by the Common Law Courts over maritime causes, by the employment of Common Law remedies, and this authority is derived wholly from the saving clause of the 9th section of the Act of 1789.

III. State legislation can modify and regulate the Common Law remedies for existing recognized rights, but no new right can be conferred on suitors or new liability created against parties to a maritime cause not enforceable in the Admiralty.

IV. As to no subject of Admiralty and mari-

time cognizance, can a Common Law Court have, by force of any State law, a jurisdiction which the Admiralty has not first had conferred upon it.

V. The limitation in the saving clause to suitors of concurrent Common Law remedies, where the "Common Law is competent to give it," confines by express terms the remedies to such as were recognized for rights existing at the Common Law in 1789, and by intendment forbids the creation of new rights or imposition of new liabilities in causes of a maritime character by State authority.

Benj. F. Thurston

AMERICAN STEAMBOAT CO., IN ERROR,

VS.

PHILIP B. CHASE, ADMINISTRATOR.

BRIEF OF WILLIAM P. SHEFFIELD,

FOR THE DEFENDANT IN ERROR.

UNITED STATES OF AMERICA.

WASHINGTON, ss.

SUPREME COURT,
DECEMBER TERM, 1871.

THE AMERICAN STEAMBOAT COMPANY, *Plaintiff in Error*
vs.
PHILIP B. CHASE, *Administrator.*

Error from the Supreme Court of the State of Rhode Island.

This is an action of the case brought under the 16th and 21st Sections of Chap. 176, of the Revised Statutes of Rhode Island, to recover damages from the plaintiffs in error, accruing in consequence of the killing of one George Cook, the intestate of the defendant in error, by the alleged negligent and wrongful act of the servants and agents of the American Steamboat Company.

The American Steamboat Company owned and had established a regular line of steamboats which ran between Newport and Providence, over the waters of Narragansett Bay.

On the evening of June 28th, 1869, two of their boats collided, and one of them was disabled, so that the steamer Whatcheer, Capt. Sutton, took the place of the regular line steamer, and captain, on the morning of the 29th.

The defendant in error, was appointed the administrator of the estate of Cook, and brought this action in the Court of Common Pleas of Rhode Island to recover damages under the following provision of the State Statute, to wit:—

"SECTION 16. If the life of any person, being a passenger in any stage coach, or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of railroad or steamboats, or the life *of any person crossing upon a public highway with reasonable care*, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor or proprietors shall be liable to damages for the injury caused by the loss of the life of such person."

SECTION 21. In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of his or her husband, widow, children, or next of kin in like manner and with like effect as in the preceding five sections provided.

The action was commenced October 12, 1869, and entered in the Court of Common Pleas for the county of Newport at its November Term, 1869. The defendant then, there filed in defence, the general issue, afterwards on the third day of that term of the court submitted to a judgment in favor of the plaintiff for $50,000, and appealed from that judgment to the Supreme Court for the county of Newport at the then next March Term of said court, and entered their appeal in the Supreme Court on the third Monday in March, A. D., 1870, at which term the defendants filed a motion "to dismiss the action for the want of jurisdiction." See Record, 6-12.

This motion was allowed by a single Justice (Potter) at *nisi prius*, and exception was taken by the plaintiff below, which was sustained upon a hearing, before the full court, Justice Potter delivering the opinion of the court. See Record, 10-23, &c.

At the September Term of the Supreme Court, A. D., 1870, the case was submitted to a jury, and a verdict was rendered in favor of the plaintiff below and defendant in error, in the sum of $12,000.

The plaintiff in error excepted to rulings at the trial, and these exceptions were taken to the full court, and there overruled.

This being the judgment of the highest court in the State, a writ of error was sued out, in which it is alleged that the State Court had no jurisdiction of the suit, and the case has been brought to this court to settle that question.

The alleged error before this court, is in the refusal of the Supreme Court of Rhode Island to dismiss the action, upon motion of the defendant in the court below, based upon the want of jurisdiction in that court to try the cause.

The defendant in the court below filed his answer to the suit while it was pending in the court of Common Pleas, but did not file his motion to dismiss the action until after the cause had been removed from that court to the Supreme Court.

Had a plea to the jurisdiction been put in, the precise question which the facts of the case authorized would have been presented; but upon a motion to dismiss, if the action could be maintained, in any possible contingency, upon the papers, as they stood, or perhaps, if by amendment authorized by the local Statute of jeofails, ch. 184, of Revised Statutes of R. I., a case could be stated within the general perview of the declaration, the motion should have been denied.

This motion stood upon the record in the case, and had no reference to the proofs, and here it stands as it stood in the court below.

The averment of place, in a declaration, in a transitory action, is ordinarily an averment which need not be proved as laid.

See 1. Chit. Pl. 267, 269.

The highest court of the State of Rhode Island, has affirmed its jurisdiction over this litigation.

Questions of jurisdiction are, ordinarily, matters in abatement of actions, and by the familiar rule of pleading the party interposing such plea in defence, "must give the plaintiff a better writ" that is, must show what other court has jurisdiction of the case made upon the papers.

A motion to dismiss is a motion addressed to the discretion of the court. See Edwards v. Hopkins, 5 R. I. 141.

A motion to dismiss, in an appellate court comes to late after pleading to the merits in the court below. Cook v. The Universalist Society, 7 R. I., Rep. 17. Potter v. Smith, Id. 55. Potter v James, et al, Id: 312.

The case presented, "is not between different tribunals, but is between distinct sovereignties." See People's Ferry Co., v. Beers, 20 How. p. 401.

It is not pretended that any other court has jurisdiction of this suit, and it is difficult to see how a State Court can take from a Federal Court, a jurisdiction which has, confessedly, never been conferred upon the federal courts.

But it is said that the jurisdiction of the subject matter of this suit has been taken from the States and been conferred upon the nation, and that the States are inhibited from enacting a statute like that upon which this action is predicated, which shall operate upon any navigable water within the limits of a state.

Common Law.

Here a question arises out of an old difference which had its origin with our Saxon ancestors and their Norman conquerors. Out of the conflict of the common law with continental systems,—between the trial by jury, and trial without jury,—between law and discretion.

In England, by Stat. 15, Rich II, c. 3. it was provided, "that in all cases things done within the body of counties, by land or water, the admiral should have no cognizance, but they should de tried by the law of the land."

"Neither the King nor his proctor could any longer justify or secure the individual who resorted to the admiralty, in a case in which the common law could give redress." See 3, Lev. 353.

In Shermonlin v. Sands, Ld. Raymond, 271, Lord Holt says: "The common law is the controlling jurisdiction, and the party seeking the admiralty must well entitle himself to draw the cause from the common law."

Nothing would seem to be better settled in England than that the admiralty has no exclusive jurisdiction, whether of persons or property, unless of matters occurring on the high seas, and out of the body of any country. See 3, Black, Com. p. 98—Eng. Ed., 1813, and cases cited. The Public Opinion 2, Hag. 398, 2, Bro. Cor. and Adm. Law. p. 116.

This being the state of the common law of England, we may well ask, if it was subjected to any, or if any, what modifications in this country prior to the adoption of the federal constitution:

Mr. Justice Story, in his Com. on the Con. vol. 3, § 1666, n, 3, says: "The admiralty and maratime jurisdiction was intended by the constitution to be exactly as extensive or exclusive and no more so in the national judiciary than it existed in the jurisprudence of the common law, in cases which a common law remedy may be adequate and proper."

Colonial Law.

The colonies were jealous of this juridiction, for it permitted an appeal to a commission of privy counsellors, and they had an aversion to foreign jurisdiction.

Before the Revolution, the people of Rhode Island were largely engaged in commerce, and perhaps, the state of the law in Rhode Island would not be otherwise than in the other colonies.

The destruction of the Liberty, the affair of the Maidstone, and the destruction of the Gaspee, on the waters of the Narragansett Bay, all antedating the destruction of tea in Boston harbor, were occasioned by the operation of these cruisers within the bodies of the counties of the State.

As early as November, 1764, the Governor and council, in remonstrating to the home government against the passage of the threatened Stamp act complained of the process proposed to be given to the court of Vice-Admiralty, under that act, as tending to deprive the people of the right of trial by jury, and as subjecting them to other great hardships and intolerable expenses. The prayer was, that the courts of Vice-Admiralty be not given more extensive powers in the colonies than it had in England.

The Stamp Act was passed in 1765, admiralty process and all, but the legislature of Rhode Island declared it to be against the British constitution and not to be law in Rhode Island, and instructed the colonial officers to disregard it. The stamp officers were sent abroad before they exposed any stamps for sale, and as there were no stamps to be purchased, there were none to be used, and no trials were had under the Stamp act.

The King claimed the right to make seizures on the waters of Narragansett Bay, and to have them adjudicated in the admiralty, and sent the cruisers to which I have referred, to enforce this right.

The colonial authorities denied this jurisdiction. Governor Ward wrote the commander of the Maidstone, in 1765, "that while the Maidstone lies within the body of a county, as she

then did, and still does, within the body of the county, of Newport, all of her officers and men are within the jurisdiction of this colony, and ought to obey the laws thereof, and while I have the honor to be in the administration, I shall endeavor to assist and maintain the liberties and privileges of his majesty's subjects, and the honor, dignity and jurisdiction of this colony."

In these views the people were stronger than the government, for the Liberty and the Gaspee were successively destroyed, and the Maidstone left the jurisdistion somewhat damaged.

The claims of the government of England and the litigation which ensued, seeking to enforce an extraordinary jurisdiction, brought forth resolutions of sympathy and support to Rhode Island from Virginia, Massachusetts, and the other colonies, and a disturbance ensued which was not allayed until the treaty of Paris.

The exercise of this jurisdiction, by the British government was one of the grounds for the Declaration of Independence.

Admiralty jurisdiction under the Constitution of the United States.

Article III, §2, of the federal constitution provides that the judicial power shall extend to all cases of admiralty and maratime jurisdiction.

The words "extends to" do not imply that the nation *shall* exhaust this jurisdiction.

The Act of Congress, commonly known as the Judiciary Act, Sec. 9, provides that the District Courts shall also have exclusive original cognizance of all civil causes of admiralty and maratime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen within their respective districts as well as upon the high seas, *saving to suitors in all cases the right of a common law remedy, when the common law is competent to give it.* Stat. at Large, vol. 1. p. 77.

At the close of the revolution the people of the several States found themselves in the possession of absolute sovereign powers.

They carved out such of these powers as affected the States collectively, and delegated them to form the federal government, and reserved the residue of their sovereign powers to form their State governments.

"Each government is sovereign as to the objects committed to it, and neither sovereign with respect to the objects committed to the other." See McCullock v. Maryland, 4, Wheat. 410.

The admiralty and maratime jurisdiction, as it then existed in the States, was the jurisdiction which was given to the federal government in the constitution, and this jurisdiction was made exclusive; thereafter the States were inhibited from using the jurisdiction which had been previously exercised by courts of admiralty.

This grant, however, did not confer upon the admiralty any common law jurisdiction or at all abridge the common law process, nor was it intended so to do, for in the exposition of the constitution, given in the Judiciary act, this process is expressly saved from the operation of this act.

It is not a cause of action at common law which is saved, but it is the common law process. "It is not a remedy at common law, but a common law remedy which is saved from the jurisdiction of the admiralty."

The plantiff in error says, "there was no remedy at common law for the injury." The defendant in error says "this is true, but the State provided a remedy, and that remedy was the common law remedy of an action of the case."

But it is said that "the State had no warrant to do this;" that the people of the State had delegated this power to the federal government, and, therfore, the legislature had no authority to act upon this subject.

The general powers of government were already reserved to the State, and were not ceded to the federal governement.

The State has the same right to exercise the reserved powers over the waters of the State, to the extent that they are reserved, as it has to exercise the reserved powers of government over the land and it has the same power to provide a remedy for injuries committed on tide waters, within the State, that it has to punish the like injuries committed on land by railroad companies who carry the mails over post routes; and it has the same right to exercise a police authority to protect its citizens upon the water, as it has to exercise this authority to protect them upon land.

The fact that the federal government has the power to carry out the objects of the federal government over water or land, does not abrogate the power of a State to protect its citizens.

If a State should legislate so as to obstruct the federal authorities in attaining the ends for which the federal government was created, such legislation of the State would be void.

So if this injury had been inflicted upon the high seas, or beyond the State jurisdiction, the State Statute would not have applied to it.

The jurisdiction of the States to enact laws punishing offences committed within the counties of States, upon waters, was affirmed in the cases of the United States v. Bevans, 3, Wheat. 336, 386. Same v. Grush, 5, Mason, 290. Smith v. Maryland, 18, How. 71. Gibbon v. Ogden. 9, Wheat. 195.

In the case Merchants Bank v. N. J. Steam Nav. Co., 6, How. p. 390, the court say, that "the common law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty jurisdiction, whether of tort or contract."

That "the saving clause was inserted (referring to the serving clause in § 9, of the judiciary act) probably from abundant

caution lest the exclusive terms in which the power is confirmed in the District Court might be deemed to have taken away the concurrent remedy which before had existed."

"This leaves the concurrent power where it stood at common law." See also 1, Kent. Com. Am. Law, p. 304, n. 6. The cases of the Moses Taylor, and Hine v. Trevor, 4th, Wallace Rep. contain nothing which limits the common law jurisdiction as it is stated in the case of Merchants Bank v. The New Jersey Steam Navigation Company.

In the case of the Belfast, 7, Wal. p. 644 and 645, this court again considered this general subject, and affirmed the concurrent jurisdiction of the common law in case of marine torts.

In Leon v. Galcum, 11 How, 191. the court say, that "suitors by virtue of the saving clause in the ninth section of the judiciary act, conferring jurisdiction in admiralty upon the district courts have the right of a common law remedy in all cases where the common law is competent to give it, and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property." See also Waring v. Clarke, 5, How, p. 460.

But nothing is better settled than that a party may waive his lien in admiralty, and bring his action *in personam* in cases of collision when the defendant is in fault and the plaintiff is without fault. See Sturgis v. Boyer, 24, How, 117, Chamberlain v. Ward 21st, How. 553.

The whole subject of the limits of the exclusive jurisdiction of admiralty in the United States is fully considered in an article in the American Law Rev., Vol. 3, p. 597, for July, 1869, where it is said "that it will be readily seen, that in nearly all cases of contract and tort connected with navigation, a personal suit at common law will afford a remedy more or less adequate."

"Thus material, men and seamen may maintain an action of debt or assumpsit against the owner or master of a vessel, or, in case of collision, an action of trespass may be brought against the master." See Id. 606.

But, we may well rest the case upon the reserved rights of the State as the conservators of the waters of the Narragansett Bay, within the territorial limits of the State, to protect by its legislation its citizens while in the pursuit of their lawful callings upon those waters.

OF THE AUTHORITY OF THE STATE TO ENACT THE STATUTE UPON WHICH THIS ACTION IS BROUGHT.

At the common law ordinarily personal actions for torts die with the person.

Yet by the Statutes of all, or nearly all of the States, these actions have been permitted to survive to the personal representative.

Trespass for an assault and battery committed on navigable waters would lie in the common law courts, and it will hardly be questioned that by virtue of the Statutes of the State where the action was brought would survive to the personal representive, and this though, this would add something to the common law remedy.

The object of the Statute of Rhode Island under consideration was the protection of the lives of the citizens of the State of Rhode Island.

It discloses no legislative purpose to obstruct or interfere with any of the agencies of the national government in executing any power committed to that government.

It provides that actions for torts which existed at common law, shall in the event of the killing of the victim of the tort, survive to his personal representative.

The presumption is in favor of the authority in the State, and before the State law can be declared to be void, it must be made to appear that it not only affects the subject matter of a grant to the nation, and have some influence over it, but be directly incompatible or repugnant,—an extreme inconvenience to it. See Story, Comm. on Const. 432, W. & M. 417 & 418. It is but a decent respect to presume in favor of a State law, until its violation of the constitution is proved beyond all reasonable doubt. Ogden *vs.* Saunders, 12 Wheat. 270.

It is said that this law is in violation of that provision of the Constitution which provides that the federal judiciary shall extend to all cases of admiralty and maratime jurisdiction.

Says Chief Justice Marshall, "this article in the Constitution is not intended for the cession of territory or of general jurisdiction." See Ogden *vs* Sanders, 12 Wheat., 388. The jurisdiction of a State is co-extensive with its territory and co-extensive with its legislative power. Ib.

The forty-fifth number of the Federalist says "the powers reserved to the several States, will extend to all objects which in the ordinary course of affairs concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."

The cases of Allen *vs.* Medberry, 21, How, 245, and of Maguire *vs* Carr, Id. p. 248, decide that the admiralty and maratime jurisdictions of the formal courts does not extend to contracts for supplies or of affreightment between the ports of the same State, and this though the vessel is a general ship plying between ports of different states.

In Groves *vs.* Slaughter, 15 Pet. 510, it was held that the State of Mississippi had the right in the absence of legislation by Congress to inhibit the introduction of slaves from other States.

When the States exercise the powers reserved as to their internal commerce and police, they may do it with impunity, while not in conflict with anything before done on the part of the national government. See 12, Conn. 7, 1 Wood & Minot 421 to 431.

The Statute we are considering relates exclusively to persons, and does not apply to things which are generally, the subject of admiralty jurisdiction.

In the License cases, 5 How. 578 &c., the power of the States to make police regulations, and to enact laws upon subjects, power over which has been delegated to Congress but not exercised was considered, and the authority of the States in the premises was fully sustained.

In the case of the Eagle, 8. Wal. 22, the Court say that all vessels entering into or departing from a domestic or foreign port are bound to obey the laws and well known usages of the port, and are subject to seizure and penalties for disobedience and in submitting to them are entitled to all the protection which they afford.

This is a motion to dismiss the action commenced by the defendant herein, in the court below, and it does not appear upon the face of the papers precisely where the homicide complained of was committed, so that if it could have been committed within the precincts of any port or place in the waters of Narragansett bay, the judgment of the court below must be affirmed.

The State governments retain the right to make such laws as they may think proper within the ordinary functions of legislation, if not inconsistent with the powers exclusively vested in Congress. Golden v. Prince, 3, Wash. C. Ct., Rep. 313. A State has an undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the

constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare."

"That all those powers which relate to merely municipal legislation, or, what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and consequently, in relation to them, the authority of a State is complete, unqualified and exclusive." The city of New York v. Miln, 11, Pet. 138 and 140.

There can be no just pretence that the State Statute, as it applies to the case at bar, in any way interferes with any *exercised* power of the federal government, to regulate commerce between the States or with foreign nations.

The State Statute provides that the right of action which Cook would have had against the plaintiffs in error, had they not killed him, should survive to his administrator and nothing more.

The effect of this Statute is simply to take from careless persons that immunity from punishment which the common law tolerates, if carelessness destroys its victims.

If Cook had been injured, no matter how much, so long as he had not been killed, no question would have been made here, that an action at common law could have been maintained by him under the State Statute, for then the remedy at common law and the common law remedy would have coincided. The Statute providing that the right of action with the common law remedy shall surdive, cannot change the jurisdiction.

W. P. SHEFFIELD,

For P. B. CHASE, *Administrator.*